In the Supreme Court of the United States.

LOUIS GROSSHOLTZ ET AL, *Appellants*,
vs.
CAROLINE NEWMAN ET AL, *Appellees*. } No. 174.

Appeal from the Circuit Court of the United States for the Western District of Texas.

BRIEF AND MEMORIAL FOR THE APPELLEES.

STATEMENT OF THE CASE.

Gustavus and Catharine Kirchburg emigrated to Texas from Philadelphia in 1845 or 1846, and settled in Austin, (Rec., p. 73, 77,) on lot. No. 6, in block 111, of said city, on which they erected a house, shop, &c., and used it as their homested.

On the 17th of December, 1850, Kirchburg bought lots 7 and 8, in the same block, from the State of Texas, but for some reason he neglected to cause a patent for the same to be issued to him. Rec., p. 18.

On the 28th of November, 1851, Gustavus conveys these two lots (7 and 8) to John Wahrenberger by a deed duly executed, and reciting a consideration of $150. (Rec., p. 12.) The defendants claim under this deed by sundry mesne conveyances.

Lots 7 and 8 are separated from lot 6 by an alley twenty feet wide. Rec., p. 4.

It appears from the evidence (Rec., p. 88, 89,) that lot 6

became the homestead of Gustavus and Catharine upon their purchase of and settlement on it in 1849 or 1850.

Under the laws of Texas (Pasch. Dig., section 1,003, article VII, const. of 1846,) the homestead of a family, whether community or separable property of the wife or husband, cannot be alienated without the consent of the wife.

Lots 7 and 8 remained unimproved by either Kirchburg or Wahrenberger until the summer of 1852, after the deed of Kirchburg to Wahrenberger. (Rec., p. 95.) About that time Kirchburg built on lot No. 7 a building used by him for a kitchen, and about the same time another building was erected on block No. 8 by one Siftegart for Kirchburg. Rec., p. 98, 51.

On June 24, 1856, Gustavus and Catharine Kirchburg executed a trust deed on all their interest in lots No. 6, 7 and 8 to J. B. Costa to secure a debt of $435 due Wahrenburger. Rec., p. 13.

On March 1, 1860, the above trust deed and debt being near barred by limitation, G. and C. Kirchburg executed a new deed of trust on lots 6, 7 and 8 to secure a note of $496.50 to Wahrenberger, with which the former note was taken up. Rec., p. 14, 58, 59.

Gustavus died intestate in 1861, ~~having~~ no issue. Catharine also died intestate, without issue, in 1862. Rec., p. 3.

John Wahrenberger died in 1864, and Caroline, his widow, became his executrix. (Rec., p. 27.) Upon the death of the Kirchburgs, Costa's power to sell under the trust deed expired, and the claim secured by said deed was duly established in the probate court and paid, (Rec., p. 27,) thus releasing block 6 and such interest as Kirchburg's estate may have had in the building on lots 7 and 8 from any and all liens of Wahrenberger.

In March, 1864, John Wahrenberger conveyed lot 8 to James Baker *alias* Kirchburg for a nominal consideration.

(Rec., p. 29, 16.) Baker conveyed it to Pressler January 14, 1868, for a valuable consideration. Rec., p. 17, 30.

In the partition of Wahrenberger's estate, lot 7 was alloted to Caroline, who sold it to Weise for a valuable consideration. Rec., p. 18, 31.

On February 11, 1869, the patent from the State of Texas for lots 7 and 8 issued to the heirs of Gustavus Kirchburg. Rec., p. 19.

On February 12, 1869, the complainants instituted on the law side of the court an action of T. T. against Pressler and Weise, two of the defendants herein, for the recovery of said lots 7 and 8, claiming under said patent. Rec. p. 10, 35.

Said action proceeded to trial, and on June 24, 1869, judgment was rendered against the complainants. Rec., p. 10, 35.

On May 16, 1870, the present bill was filed. (Rec., p. 1.)

On February 6, 1872, the cause was heard upon bill, answers, replication, proofs and exhibits, and decree entered in favor of the defendants. (Rec., p. 112.) The complainants appealed to this court.

On the trial of the action at law the complainants offered to introduce the trust deeds to J. B. Costa to avoid the effects of the deed in fee, made by Gustavus Kirchburg to John Wahrenburger in 1851, (Rec., p. 10, 35,) but the court held that they were inadmissible in evidence in the suit at law, and excluded them.

This exclusion of evidence is relied on to give jurisdiction, and to avoid the plea of *res adjudacata*, set up by the defendants herein in their answers. Rec., p. 56.

The chief ground of the relief sought by complainants is their assumption that at the time of the conveyance of lots 7 and 8 by Kirchburg to Wahrenberger, these lots formed a part of the Kirchburgs homestead, and that Catharine having failed to join Gustavus in the convey-

ance, it was absolutely null and void under the laws of Texas. Pasch. Dig., 1,003.

In regard to the first point, it will be remembered that on the trial at law the plaintiffs sought to introduce the trust deeds above mentioned, in order to rebut the presumption that Wahrenberger ever held lots 7 and 8 by a legal title, and that, on the contrary, the deed to him of 1851, even if valid, was really only a mortgage, and that Wahrenberger never owned the lots himself by any legal title, and only had, at the utmost, an equitable interest in them.

The correctness of the ruling of the court is not here for revision, still there can be no question but that it was entirely correct, and that the plaintiffs sueing at law could not rely upon an equitable title for a recovery.

Having been defeated on the law side, complainants made their second attack on the equity side, but an inspection of the bill will show that they do not set up any equitable title, any trust, or any ground of relief which has not already been passed upon in the action at law.

The bill charges that lots 6, 7 and 8 were the homestead of Gustavus and Catharine, (Rec., p. 4,) and that Gustavus, without the concurrence of Catharine, "on or about the 28th day of November, A. D. 1851, assumed and undertook, by his separate deed of that date, to convey the said lots to the said J. W. Rec., p. 4, 5.

Then there is a charge that Gustavus and Catharine occupied said lots 7 and 8 after the date of said deed for more than ten years openly and adversely to Wahrenburger, and thereby, under the laws of Texas, the title reverted in them. Rec., p. 6; Pasch. Dig., article 4,621, 4,624.

And lastly, a charge that by reason of the trust deeds on lots 6, 7 and 8 Wahrenberger was estopped from claim-

ing under the deed conveying to him lots 7 and 8. Rec., p. 6.

These are the only allegations relevant to the point now under discussion. There is nowhere a charge that that deed was a mortgage, no offer to pay such mortgage, no charge that it has been paid and discharged.

The bill rests entirely upon the allegation that the deed was void for want of certain formalities. The proof is confined to this issue; there is not an allegation, not a particle of proof tending to establish in the most remote manner a trust, an equity.

The only matters alleged and passed upon in this suit are identically the same that were considered in the action at law.

Not only, therefore, is the bill liable to be dismissed for want of jurisdiction from entire adequacy of relief at law, but the plea of *res adjudicata* in the answer is good at least as to two of the defendants herein. Simpson *vs.* Hart, 1 Johns., ch. 91.

In reference to the second point, we submit that the proof shows conclusively that lots 7 and 8 were no part of the homestead of Gustavus and Catharine Kirchburg when they were conveyed by the former to Wahrenberger, and that the property being community property and under the sole management of the husband, under the law of Texas (Pasch. Dig., Article, 4641, 4642) the deed of Kirchburg to Wahrenberger is valid and binding, and conveyed a full and legal title to Wahrenberger. See the evidence of Cullen, Rec., p. 94, 95; and Caulfield, Rec., p. 99; see as to homestead.

We do not suppose that it is necessary to dwell at any length upon the fact of the patent to lots 7 and 8 having issued in 1869 to the heirs of Kirchburg. By virtue of Kirchburg's deed to Wahrenberger that patent enures to the benefit of his grantee and assignees. Gould *vs.* West,

32 Tenn., 338, and authorities there cited; and Lamb *vs.* Davenport, opinion by Miller, J., U. S. Supreme Court, October term, 1873, No. 19.

The decree of the Circuit Court should be affirmed.

JOHN HANCOCK,
C. S. WEST,
Attorneys for Appellees.

Supreme Court of the United States.

LOUIS GROSHOLZ *et al.*
vs.
CAROLINE NEWMAN *et al.*
No. 174.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

The appellants here were the complainants below. The greater part of the record is useless in the controversy, except so far as it shows the desperate character of the defense.

The bill is to cancel two deeds of trust upon the property in controversy; some deeds by Horan, the *cestui que trust*, and his widow to the other defendants; for an account of rent, and for the recovery of the property. The plaintiffs claim as heirs of Caroline Kirchberg, who survived her husband, and who, as survivor, (in the absence of issue,) under the laws of Texas, became the owner of all the community property acquired during the marriage, and likewise of the homestead.

The theory of the defense was to deny the marriage; to argue against rather than deny the fact of homestead; and to deny the force of the Texas laws upon the claim of the defendants.

The denial of the marriage was based upon some loose, crazy, or drunken statements of the husband, upon one or two occasions.

The proof of marriage was needless, as, under the laws

of Texas, the coming to Texas as husband and wife, acquiring property there, as such, and holding themselves out to the world in that relation, not only established the presumption of marriage, but gave the wife all the benefits of community property, whether they were married or not. And this rule goes the length of excluding a lawful wife in another State. *Babb* v. *Carroll*, 21 Tex. 766; *Wheat* v. *Owens*, 15 Tex. 243.

The marriage, however, was indubitably established by the priest who solemnized it and the witnesses who were present.

The parties moved from Philadelphia to Texas in 1850. They purchased three lots, 6, 7, and 8, in block 111, in Austin; the last two were purchased from the State, and paid for in December of that year. And under a statute, long after the incumbrances which the bill is filed to remove, the patents issued to the heirs of the purchasers. (Paschal's Dig. p. 914*a*; 3d ed. art. 4288*a*, note 978*a*.) This is the universal rule in Texas, and the result is that the legal title is in the heirs; and whatever title the defendants have, must be founded upon an enuring equity.

In this case there is no such equity. Kirchberg and wife first built a blacksmith shop and residence upon lot 6; the residence being upon the rear of the lot, fronting upon the alley. But as early as 1850, they purchased lots 7 and 8, and upon lot 7 they erected a kitchen; and upon lot 8 the privy and a small house and brewery were erected by a tenant, and the brewery was used or rented to others by the husband, and afterwards by the wife, until the death of both. Dr. Haynie and several other witnesses swear positively that all three of the lots were designated and used as the homestead of Kirchberg and wife, from the time of their purchase until the death of Mrs. Kirchberg.

This, then, is the claim of the plaintiffs: that Kirchberg and wife owned the property as community of acquests and gains, *bought and paid for* 16 December, 1850, (Rec., p. 19;) that the husband having died childless, the wife, as survivor, became the owner of all the community property,

whether the title was legal or equitable; that the lots in controversy, as early as 1850, (the date of the purchase,) were dedicated, used and occupied as a part of the homestead of the family; that as such they were not subject to forced sale, (the homestead was, indeed, exempt from debt;) that it was not subject to alienation by the husband unless he was joined by the wife, in a deed acknowledged by the wife separate and apart from her husband; that upon the death of the husband, this homestead right, as well as the absolute fee in the property, was cast upon the wife; and upon her death the property was cast upon the appellants, as her next of kin, under the statute of descent and distribution in Texas, and that the patent which issued to the heirs of Gustavus Kirchberg on 11 February, 1869, (p. 10,) enured to the benefit of the complainants, as heirs of Catherine, the survivor of the spouses.

DEFENDANTS' CLAIM.

The legal effect of all the answers is, to concede that the defendants rest their claim alone upon the deed of Gustavus Kirchberg to John Horan, of 28 November, 1851, (Rec. p. 12.) This deed is for the two lots, (7 and 8,) for the acknowledged consideration of $150. For although there are two deeds of trust on lots 6, 7, and 8, to John B. Costa; one dated 24 June, 1856, to secure a debt to John Wahrenberger, for $435; the other, dated 1 March, 1860, to the same party, to secure the same beneficiary, $496 50; yet all the answers admit that the last deed was given in satisfaction of the first, and that after the death of Kirchberg and wife, this same Wahrenberger became the administrator of both husband and wife; that by a decree of the probate court, he sold lot 6, and satisfied this deed of trust, and all other debts against the estate, although he filed no release or extinguishment of the deed of trust to Costa, nor has Costa formally divested himself of the legal title.

Wahrenberger, after this extinguishment of his debt, on 4 March, 1864, for an acknowledged consideration of one

dollar, conveyed or gave lot 8 to one James Kirchberg, and James K., on 14 January, 1868, conveyed this lot to the defendant, Pressler. Caroline Wahrenberger, the widow of John Wahrenberger, on 31 December, 1868, conveyed lot 7 to the defendant, Charles Weise. None of the defendants squarely, and of their knowledge, deny that all the property had been the homestead of Kirchberg and his wife for some fourteen years. If their answers mean anything, they assume that, although the property was the homestead of Kirchberg, it was a homestead upon Wahrenberger's property; and that after the death of the spouses, Wahrenberger, as their administrator, sold a part of his own property to pay the debts of his intestates to himself! This is such an extraordinary defense, that upon these answers the chancellor ought to have decreed the property to the complainants.

But the witnesses, Dr. Haynie, (p. 87,) Louis Horst, (p. 88,) Ernst Raven, (p. 89,) prove that the three lots constituted the homestead of the family from 1850. The defendants' witnesses prove the building of the houses on lots 7 and 8 in 1852; but that makes no difference as to the extent of the homestead in fact. The value of the property and of the rents were proved.

Assignment of Errors.

The appellants assign for error, that the court dismissed the bill when the relief prayed in behalf of the complainants ought to have been granted.

I.

THE LAW OF DESCENTS.

By sec. 4 of the act of 18 March, 1848, "when any person, having title to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows: 1st. * * * 2d.

If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate of the intestate, not to include slaves, and to one half of the lands *and slaves* of the intestate, without remainder to any person or persons, and the other half shall pass and be inherited according to the rules of descent and distribution, as prescribed in the foregoing sections of this act: *Provided, however*, That if the deceased have neither surviving father nor mother, nor surviving brothers and sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate, real, personal, and mixed." *Paschal's Digest*, art. 3422.

Thus the property was cast upon Katharine Kirchberg, by the death of her husband.

And by art. 3419: "3dly. If there be neither father nor mother, then the whole of such estate shall pass to the brothers and sisters of the intestate, and to their descendants, or to such of them as there be."

II.

THE LAW OF THE HOMESTEAD.

But the defendants say, that because of the deed of the husband to Wahrenberger (p. 12) nothing descended; for that the property passed to W.

If the property had not been the homestead, as to the naked power of the husband to sell the community property, this may be admitted. The law reads thus:

"All property acquired by either husband or wife, during the marriage, except that which is acquired in the manner specified in the second section of this act, shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband only; it shall be liable for the debts of the husband, and for the debts of the wife, contracted during the marriage for necessaries; and upon the dissolution of the marriage by death, the remainder of such common property shall go to the survivor, if the deceased have no child or children;

but if the deceased have a child or children, the survivor shall be entitled to one half of said property, and the other half shall pass to the child or children of the deceased." *Paschal's Digest*, art. 4624.

But, the property being the homestead of the family, this law is controlled by the constitution and law governing the homestead.

And here, to save printing law in our points, we furnish the court copies of the chapter HOMESTEAD, in vol. II, Paschal's Digest of Decisions, §§ 14537–14676. These sections give the statute and organic law of Texas touching the homestead, and the Texas decisions thereon.

They show that these general principles have been settled: That the value of the city "lot or lots" is to be estimated, irrespective of improvements, at the time of their designation; that the lots need not be contiguous or adjoining, but may be separated by streets and blocks; that it is not so much the use or the fact of occupation, as the designation, which determines what is the homestead; that to rent or to permit others to use a part of the homestead weighs nothing against the family; that the husband can neither sell nor incumber the homestead for debts, except by the consent of the wife, in the manner provided by the statute; that such a deed as that on which reliance is placed here, neither binds the husband nor the wife; that the husband may recover the land against it; that even deeds of trust, or mortgages, duly acknowledged by the wife, are not binding upon her, and they cannot subject the homestead to forced sale; that the homestead survives to the widow and family, and may be alienated by the widow; that the homestead cannot be the subject of fraudulent conveyance, because it is not a fund out of which the creditors are to be paid, &c., &c. Particular attention is invited to the following sections: 14537–14539; 14549–14555; 14609–14620.

The whole chapter is exhaustive of the Texas decisions. They settle that the homestead is protected against debts; and that the husband cannot alienate it without being

joined by the wife, under her separate acknowledgment, as required by our law about conveyances, viz:

"AN ACT DEFINING THE MODE OF CONVEYING PROPERTY IN WHICH THE WIFE HAS AN INTEREST.

"That when a husband and his wife have signed and sealed any deed or other writing purporting to be a conveyance of any estate or interest in any land, slave or slaves or other effects, the separate property of the wife, or of the homestead of the family, or other property exempted by law from execution, if the wife appear before any judge of the supreme or district court, or notary public, and being privily examined by such officer, apart from her husband, shall declare that she did freely and willingly sign and seal the said writing, to be then shown and explained to her, and wishes not to retract it, and shall acknowledge the said deed or writing so again shown to her to be her act, thereupon such judge or notary shall certify such privy examination, acknowledgment, and declaration, under his hand and seal, by a certificate annexed to said writing to the following effect or substance, viz:

"State of Texas, county of ——. Before me, —— ——, judge of, or notary public of —— county, personally appeared —— ——, wife of —— ——, parties to a certain deed or writing bearing date on the —— day of ——, and hereto annexed, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said —— ——, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it; to certify which I hereby sign my name and affiix my seal, this —— day of ——, A. D. ——. [SEAL.]" *Paschal's Digest*, art, 1003, note 427.

This acknowledgment is of the essence of the deed. *Cross* v. *Everts*, 28 Tex., 524.

In view of these cases and of the facts, the deed of Wahrenberger to Horan was an absolute nullity, and it could be no foundation for the transmission of title to another.

III.

THE DEED WAS A MORTGAGE.

There are other answers in equity to that deed. Although absolute upon its face, all the facts show that

Horan dealt with it as a mortgage, or mere security for a debt.

And, under the Texas law, the defeasance may exist in parol, and may be proved by circumstances.

After the death of the nominal purchaser, parol evidence is admissible to establish the trust against the express declaration of the deed. (2 Story's Eq. § 1201, n. 2*a*; Lench *v.* Lench, 10 Ves. 511; Boyd *v.* McLean, 1 Johns. Ch. 582; Bottsford *v.* Burr, 2 Johns. Ch. 404; Decouche *v.* Savetier, 3 Johns. Ch. 216; Graham *v.* Gabbald, 3 Binney, 402.) *Neill* v. *Keese*, 5 Tex., 29, 30.

It is competent for the defendant in an action of trespass to try title, under the plea of "not guilty," to prove as a matter of defense that his deed to the plaintiff, and on which the latter relies, although absolute on its face, was in fact a mortgage. He need not plead it specially. (Punderson *v.* Love, 3 Tex. 60; Rivers *v.* Foote, 11 Tex., 663.) *Mann* v. *Falcon*, 25 Tex. 274.

A formal conveyance may be shown to be a mortgage by extrinsic proof, while a formal mortgage may not be shown to be a conditional sale by the same means. In the one case the proof raises an equity consistent with the writing, and in the other would contradict it. (Kunkle *v.* Wolfersberger, 6 Watts, 130; Woods *v.* Calwell, 3 Watts, 188.) *Thompson* v. *Chumney*, 28 Tex. 395.

Parol evidence is admissible to prove that a deed or instrument absolute on its face was executed upon unwritten trusts, (Carter *v.* Carter 5 Tex. 93,) or that it was a mortgage. (Bishop *v.* Bishop, 13 Ala. N. S. 475; Stampers *v.* Johnson, 3 Tex. 1; Kennedy *v.* Kennedy, 2 Ala. 589; Sledge *v.* Clopton, 6 Ala. 603.) *Mead* v. *Randolph*, 8 Tex. 196; *McClenny* v. *Floyd*, 10 Tex. 163. Thus a deed absolute upon its face may be proved by parol, and the attending circumstance to be a mortgage. (4 Kent's Comm. 142, 144; Bird *v.* Wilkinson, 4 Leigh, 266; Sheehy *v.* Mandeville, 7 Cr. 218; Pleasants *v.* Pleasants, 2 Call, 354; Belton *v.* Avery, 2 Root, 279; Wood *v.* Roach, 1 Yates, 179; Wilson *v.* Carver, 4 Hayw. 93; Preston *v.* Briggs,

1 Wash. 125; Walter *v.* Radcliffe, 2 Desauss., 577; 1 Powell on Mortgages, 125; Strong *v.* Stewart, 4 Johns. Ch. 167; Lane *v.* Shears, 1 Wend. 433; Walton *v.* Cronly, 14 Wend. 63; Yarbrough *v.* Newell, 10 Yerg. 376; Clark *v.* Henry, 2 Cow. 324; Buxton *v.* Lister, 3 Atk. 385; Marks *v.* Pell, 1 Johns. Ch. 594; Washburn *v.* Merrills, 1 Day, 139; Murphy *v.* Trigg, 1 Monr. 73.) Such evidence is not a variation, but explanatory of the agreement. *Stampers* v. *Johnson* 3 Tex. 3, 4.

IV.

ANY RIGHT UNDER IT WAS LOST BY LIMITATION.

But whatever may have been its character in the hands of the grantee, it was a derelict or thing abandoned. The grantor remained in possession over ten years, using and enjoying the property, and holding it adversely. (Rhodes *v.* Whitehead, 27 Tex. 308.) This, under our statutes of limitations, "without any evidence of title, shall give to such naked possessor full property precursive of all other claims, in and to six hundred and forty acres of land, including his, her, or their improvement." (Paschal's Dig. art. 4624, n. 1033.) This has been interpreted to extend to the boundaries of the pedal possession, whatever they may be.

Charle v. *Saffold*, 13 Tex. 94–112.
Wofford v. *McKinna*, 23 Tex. 46.
Pillow v. *Roberts*, 13 How. 472.
Smith *v.* Garza, 15 Tex. 153, 158.
Forrest *v.* Woodall, 33 Tex. 365.
McMasters *v.* Mills, 30 Tex. 59.
Ballard *v.* Perry, 28 Tex. 350.
Fish *v.* Wilson, 15 Tex. 436.

And such possession, when the time is completed, can be made the sword of attack as well as a shield of defense. It becomes immaterial whether the possession ceases or is continued.

Cook v. *Knott*, 28 Tex. 857.

Again, if Horan's deed was valuable for any purpose, it gave him the right of entry, and having neglected to make entry within ten years, he is forever barred. (Paschal's Dig. art. 4621, n. 1030.)

Horton v. *Crawford*, 10 Tex. 388.
Scott v. *Rhea*, 21 Tex. 711.
Christy v. *Alford*, 17 How. 605.

Both in England and America it has been generally held that adverse possession of land, during the period of limitation, confers title on such possessor, and that upon such title thus acquired he could recover the land from any one who might afterwards have adverse possession. (Davenport *v.* Tyrne, Blackstone's Reports, 675, 678; Jackson *v.* Diffendorf, 3 Johns. 269; Jackson *v.* Rightmyre, 16 Johns. 314; 3 Blackst. Comm. 196; 2 Blackst. Comm. 264; Chalfin *v.* Malone, 9 B. Monr. 498; Chiles *v.* Jones, 4 Dana, 483; Flecker *v.* Bank of the United States, 5 Pet. 438; Ang. on Lim. 14, 458, 460, and Appendix, XV, XXVI, XXX.) *Cunningham* v. *Frandtzen*, 26 Tex. 41, 42.

The only qualification in Texas is, that the peaceable possession, which gives title in full property to the naked possessor after ten years, must be continuous and certain. *Sloan* v. *Martin*, 33 Tex. 418, 419; *Stafford* v. *King*, 30 Tex. 277. And where these facts are proved, no question of good faith in the naked possessor is involved. *Kinney* v. *Vinson*, 32 Tex. 128. The possession within the meaning of section 17 (art. 4624, n. 1043) is all that is necessary. *Hendricks* v. *Snediker*, 30 Tex. 307.

In the light of these cases, whatever may have been the character of the deed of Kirchberg to Horan, the right of entry was lost, and Kirchberg and wife held a full and indefeasible title after ten years. Therefore, when Wahrenberger entered, as the administrator of the Horans, he entered as any other stranger, (or rather in his fiduciary character,) and he had no title which he could alienate. As a creditor, he stood upon the same footing as any other creditor, with possibly the open question in Texas,

as to whether or not, after the death of the wife, the homestead is liable for the debts of the community. The heirs have not raised this question. Wahrenberger sold lot 6, on which the shop and the dwelling stood, and with the proceeds of sale paid his own deed of trust and all the other debts, and left lots 7 and 8 free for the heirs. The parties admit that the first mortgage was extinguished by the second; and the fair inference is, that the deed for $150 was a mortgage which was extinguished by the first deed of trust to Costa. In equity, this or any other just theory may be indulged from the lapse of time, from the fact that Horan accepted mortgages with covenants of warranty for property, to which he held a title absolute in form; that he sought not to enforce the $150 as administrator. His conveyance to James Kirchberg proves nothing, nor can the heir claim more under it than Kirchberg could have claimed. Notice of the long possession and of the homestead of the Kirchbergs are fully proved. And, with or without notice, the vendees could acquire no more title than Wahrenberger had to sell, which was just none.

Respectfully submitted.

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For Appellants.